United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: October 14, 2004

TO : Alvin P. Blyer, Regional Director
Region 29

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Local 32b-32j, SEIU, AFL-CIO
(Allied Properties, LLC)
Case 29-CB-12639

This case was submitted for advice as to whether the Union's state court lawsuit seeking to require the purchaser of a business to hire the employees of the seller, pursuant to the New York City Displaced Building Service Workers Protection Act, violates Section 8(b)(1) or (3) of the Act. We conclude that the lawsuit does not violate the Act because it is not retaliatory against, and would have no impact upon, the exercise of Section 7 rights.

FACTS

In July 2004, Allied Properties (the Employer) purchased several residential apartment buildings from another entity which had employed building service workers to handle maintenance in the buildings. The Union had represented the employees for years and was a party to collective-bargaining agreements with the predecessor employer at each building. The Employer decided to subcontract the maintenance work and did not hire any maintenance employees.

The Union responded by, among other things, filing a lawsuit in New York State Supreme Court alleging that the Employer had violated the New York City Displaced Building Service Workers Protection Act, NYC Admin. Code Sec. 22-505 et seq. ("the Protection Act"), by failing to hire the maintenance employees. The Protection Act obligates purchasers of residential buildings in New York City to retain, for a 90 day transition period, those building service workers employed at the building by the former owner. It also obligates the purchaser to perform a written performance evaluation for each retained employee after the 90 day period is complete, and to offer continued employment to any employee who receives a satisfactory evaluation. The stated purpose of the Protection Act is to provide for stability in employment during the post-September 11 recession, and to thereby reduce the need for reliance on an over-burdened city social service system.

The Employer sought to remove the suit to federal court. Its petition was rejected by the United States District Court for the Eastern District of New York and the matter was remanded to state court. The Employer has asked that the Board intervene in the suit and argue that the Protection Act is preempted by the NLRA. The Special Litigation Branch is considering that request.

In response to questioning, the Employer has provided no explanation of its allegation that the Union's conduct violates Section 8(b)(1)[1] and (3). Rather, the Employer has continually asserted that the suit is preempted because it would force the Employer to become a successor employer in a situation where it would not be a successor employer under the NLRA.[2]

ACTION

We conclude that the charge should be dismissed, absent withdrawal.

In Stroehmann Bakeries,[3] the Board held that the maintenance of a preempted lawsuit cannot be condemned as an unfair labor practice unless the suit is retaliatory against Section 7 activity or is shown to have a reasonable tendency to restrain or coerce employees in the exercise of Section 7 rights. The Board first concluded that the district court was preempted from adjudicating the union's claims that the Board had incorrectly decided voter eligibility questions in a representation proceeding and that the employer had violated a Stipulated Election Agreement. The Board further concluded, however, that the suit was not unlawful because it was directed at the Board and the employer, not at employees; it did not seek to impose a collective-bargaining agreement or union-security obligation on employees; and it would not otherwise tend to restrain or coerce employees in the exercise of Section 7 rights.[4]

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[1] The Employer has not identified a particular subsection of 8(b)(1) allegedly violated.

[2] See NLRB v. Burns Int'l Security Serv., 406 U.S. 272 (1972).

[3] Bakery Workers Local 6 (Stroehmann Bakeries), 320 NLRB 133, 137-138 (1995).

[4] Although the Board conceded that successful prosecution of the union's suit would have resulted in the imposition on employees of a union the Board had determined did not represent a majority, it found that the peaceful invocation of judicial processes with the objective of seeking 9(a)

Here, the Union's suit is directed at the Employer and seeks only the hiring of the bargaining unit employees. It would have no apparent impact on the exercise of Section 7 rights, and the Employer has not suggested any such impact. Therefore, even assuming the suit is preempted, and regardless of whether or not it is reasonably based, its prosecution is not a violation of the Act.

Accordingly, the Region should dismiss the charge absent withdrawal.

B.J.K.

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recognition should not be deemed "restraint or coercion," citing NLRB v. Teamsters Local 639 (Curtis Bros.), 362 U.S. 274 (1960). The Board further found that the suit did not have an unlawful object because it did not seek to circumvent the primary jurisdiction of the Board, but rather sought an exception to the Board's primary jurisdiction under Leedom v. Kyne, 358 U.S. 184 (1958).